

April 5, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Minneapolis Star Tribune

Date of Filing: March 8, 2005

Case Number: TFA-0091

On March 8, 2005, the Minneapolis Star Tribune (the Appellant) filed an Appeal from a final determination issued on January 14, 2005 by the Department of Energy's (DOE) National Energy Technology Laboratory (NETL). In that determination, NETL responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NETL's determination identified and released one document as responsive to this request. However, NETL withheld portions of this document under FOIA Exemptions 4 and 5. This Appeal, if granted, would require NETL to release that information withheld under Exemption 5 to the Appellant.

I. BACKGROUND

The Appellant filed a Request for Information with NETL seeking information concerning the DOE's award of financial assistance to the Mesaba Energy Project (the MEP). On January 14, 2005, NETL issued a determination letter (the Determination Letter) identifying one responsive document: The Report of the Merit Review Committee for the Clean Coal Initiative, Round 2 (the Report). NETL released the Report to the Appellant. However, NETL withheld portions of the Report under FOIA Exemptions 4 and 5. On March 8, 2005, the Appellant submitted the present Appeal which challenges NETL's withholding determinations under Exemption 5.¹

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*,

¹ The Appellant does not challenge NETL's withholdings under Exemption 4.

617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 5 is at issue in the present case.

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, **and** it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *United States Department of the Interior v. Klamath Water Users Protective Association*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*) (emphasis supplied). "The first condition of Exemption 5 is no less important than the second; the communication must be 'interagency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 121 S. Ct. at 1066.

For information obtained from Government sources, the Supreme Court has held that Exemption 5 incorporates those "privileges which the Government enjoys under the relevant statutory and case law in the pre-trial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); see also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800, 104 S.Ct. 1488 (1984) (*Weber Aircraft*); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). It is well settled that the deliberative process privilege is among the privileges that fall under Exemption 5. *Klamath*, 121 S. Ct. at 1065.

The deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150, 95 S. Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.* at 151, 95 S. Ct. 1504, by protecting open and frank discussion among those who make them within the Government. See *EPA v. Mink*, 410 U.S. 73, 86-87, 93 S. Ct. 827 (1972) (*Mink*); see also *Weber Aircraft Corp.*, 465 U.S. at 802, 104 S. Ct. 1488.

In order for the deliberative process to shield a document, it must be both *pre-decisional*, i.e. generated before the adoption of agency policy, and *deliberative*, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Id.* Even then, however, the exemption only covers the subjective, deliberative portion of the document. *Mink*, 410 U.S. at 87-91. An agency must disclose factual information contained in the protected document unless the factual material is "inextricably intertwined" with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Turning to the document at issue in the present case, we find that the portions of the Report withheld by NETL under Exemption 5 are clearly deliberative and pre-decisional. The information withheld by NETL under Exemption 5 consists of the names of evaluation committee members, consultants

and other participants in the decision making process, the conclusions and recommendations of the evaluation panel members, the Technical Ranking Sheets, the Repayment, Finance and Budget Ranking Sheet, the Summary Ranking Sheet, Actual Scores, and Description of Strengths and Weaknesses.

The names of evaluation committee members, consultants and other participants in the decision making process are properly withheld under Exemption 5's deliberative process privilege. The privilege exists to protect the integrity of the deliberative process. Releasing the names of individuals who participate in the deliberative process might discourage them from fully and frankly communicating their opinions and recommendations, exactly the result that the privilege's authors sought to prevent. For this reason, the courts have routinely held that withholding the names of individuals participating in the deliberative process is entirely appropriate under Exemption 5's deliberative process privilege. *Brinton v. Department of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *City of West Chicago v. Nuclear Regulatory Commission*, 547 F. Supp. 740, 750 (N.D. Ill. 1982). Accordingly, the names of evaluation committee members, consultants and other participants in the decision making process were properly withheld.

The conclusions and recommendations of the evaluation panel members, the Technical Ranking Sheets, the Repayment, Finance and Budget Ranking Sheet, the Summary Ranking Sheet, Actual Scores, and Description of Strengths and Weaknesses are also properly withheld under Exemption 5's deliberative process privilege. This information consists of the non-binding opinions and recommendations of advisors and consultants to the official who ultimately decided to grant financial assistance to the MEP. This information is therefore both pre-decisional and deliberative in nature. For these reasons, we have concluded that they were properly withheld under Exemption 5.

The Appellant contends that release of the withheld information would be in the public interest. We disagree. The chilling of the deliberative process that would result from release of the withheld information, as we have discussed above, would not further the public interest. Nor would release of mere opinions or recommendations, as opposed to information reflecting actual governmental decisions and reasoning, shed any useful light on the operations and activities of the Government.

III. CONCLUSION

For the reasons stated above, we have found that all the information withheld under Exemption 5 by the National Energy Technology Laboratory was exempt from disclosure under that Exemption. Accordingly, we have concluded that the present appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by the Minneapolis Star Tribune, Case No. TFA-0091, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought

in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 5, 2005